No. 80-1200

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In the Supreme Court of the United States

OCTOBER TERM, 1980

FRANK VERNON ROZA, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. (& Supp. III) 1961 *et seq.*, is unconstitutionally vague and overbroad.

1. Following a jury trial in the United States District Court for the Northern District of California, petitioner was convicted on one count of conducting an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); one count of investing in an enterprise the income derived from a pattern of racketeering activity, in violation of 18 U.S.C. 1962(a); five counts of interstate transportation of stolen property, in violation of 18 U.S.C. 2314; and one count of receiving stolen property that had been transported in interstate commerce, in violation of 18 U.S.C. 2315. Petitioner was sentenced to 15 years' imprisonment and fined $25,000. In addition, petitioner's coin business and a Ferrari automobile, which had been

involved in the racketeering offenses, were ordered to be forfeited to the United States under 18 U.S.C. 1963(a)(1). The court of appeals affirmed (Pet. App. 1a-9a).

The evidence at trial showed that between January and August of 1978, petitioner's co-defendants burglarized three post offices in California and Washington, stealing more than $400,000 in stamps, food coupons, and currency. The same group also attempted unsuccessfully to commit burglaries at three other California post offices (RT 79, 893-896).[1] The stolen stamps were transported to Nevada where they were "fenced" by petitioner. Petitioner also "laundered" the proceeds of the sales of stolen stamps through one of his businesses, the Consolidated Coin Company of Carson City, Nevada. The scheme was detected when postal inspectors learned that postage stamps were being sold at a San Francisco stamp show at 15% below their face value (RT 81-85). The fencing operation was traced back to petitioner.

The government's case chiefly consisted of the testimony of William Eggers, who participated in all of the burglaries, and Joseph Escove, a San Francisco coin dealer who fenced stolen stamps that he received from petitioner. Their testimony was corroborated by a variety of documentary and physical evidence, and by tape recordings of conversations among the burglars that Eggers secretly made after he had agreed to cooperate with the government. The evidence against petitioner was further corroborated by the testimony of two other coin dealers, George Eggimann and Marcus Reaves, who had learned of petitioner's fencing operation. Petitioner knew about at least one of the burglaries in advance (RT 439-440), and he told Escove that the stolen

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[1] "RT" refers to the reporter's transcript of the trial. The citations herein to the record are taken from the government's brief in the court of appeals.

stamps were ordinarily received within 24 hours of the burglaries (RT 658). Petitioner purchased a Ferrari with a $35,000 check drawn on his Consolidated Coin Company account (RT 612-613), which was used to deposit funds obtained from fencing the stolen stamps (RT 640-646). When petitioner was arrested, a search of the Ferrari uncovered $29,000 in stolen stamps (RT 89-95, 106-111, 612-613).

2. Petitioner contends that his conviction on the two RICO counts should be set aside on the ground that the RICO statute is unconstitutionally vague and overbroad. At the outset, we note that petitioner failed to raise his claim in the lower courts, and thus it is not properly before the Court. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).[2] In any event, petitioner's claim is without merit.

Contrary to petitioner's assertion, the RICO statute is not unconstitutionally vague simply because the courts have differed in their interpretations of its precise scope. Indeed, every court of appeals to address the vagueness claim has rejected it. See *United States* v. *Aleman*, 609 F. 2d 298, 305 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980); *United States* v. *Swiderski*, 593 F. 2d 1246, 1249 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979); *United States* v. *Hawes*, 529 F. 2d 472, 479 (5th Cir. 1976); *United States* v. *Campanale*, 518 F. 2d 352, 363-364 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976); *United States* v. *Parness*, 503 F. 2d 430, 440-442 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975). See also *United States* v. *Huber*, 603 F. 2d 387, 393 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980); *United States* v. *Cappetto*, 502 F. 2d 1351, 1357-1358 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975).

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[2]Petitioner's co-defendant, Robert G. Moore, raised the claim below, but the court of appeals rejected it (Pet. App. 5a).

Especially since the predicate acts of racketeering were themselves clearly illegal (see 18 U.S.C. (& Supp. III) 1961(1)), petitioner unquestionably had "fair warning * * * as to what conduct is criminal * * *" (*Huddleston* v. *United States*, 415 U.S. 814, 831 (1974)) and was not "forced to speculate * * * whether his conduct [was] prohibited" (*Dunn* v. *United States*, 442 U.S. 100, 112 (1979)).

Similarly, petitioner's claim of overbreadth is insubstantial. Although RICO is necessarily encompassing in order to achieve its purpose of "eradicat[ing] organized crime in the United States * * *" (Pub. L. No. 91-452, 84 Stat. 923, 18 U.S.C. 1961 note), it does not implicate any constitutional right that could give rise to a colorable issue of overbreadth.

Finally, even if application of RICO were uncertain in some hypothetical situations, petitioner would have no ground for complaint in this case. The principle is firmly established that a person properly subject to the prohibitions of a statute may not escape punishment by contending that the statute is invalid as applied to others. See, *e.g.*, *United States* v. *Powell*, 423 U.S. 87 (1976); *Parker* v. *Levy*, 417 U.S. 733, 755-756, 759 (1974); *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973).[3]

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[3]~~Although it~~ is not raised in the question presented, petitioner's vagueness and overbreadth arguments advert (Pet. 7, 9-10) to the issue whether RICO is applicable to a wholly illegitimate enterprise. That issue is currently before the Court in *United States* v. *Turkette*, cert. granted, No. 80-808 (Jan. 26, 1981). Because the issue is not raised in the petition, and because in any event petitioner's legitimate business was used in his fencing operation, we believe that there is no need to hold the petition pending decision in *Turkette*. See *United States* v. *Sutton*, Nos. 78-5134 to 78-5139, 78-5141 to 78-5143 (6th Cir. Dec. 3, 1980) (en banc), slip op. 25-27, rev'g 605 F. 2d 260 (6th Cir. 1979), petitions for cert. pending, *Elkins* v. *United States*, No. 80-6058 (filed Jan. 19, 1981), *Hensley* v. *United States*, No. 80-6137 (filed Feb. 2, 1981), *Harris* v. *United States*, No. 80-6147 (filed Jan. 31, 1981), *Holmes* v. *United States*, No. 80-6253 (filed Feb. 27, 1981), *Adams* v. *United States*, No.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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80-6254 (filed Feb. 27, 1981), *Cravens* v. *United States*, No. 80-6272 (filed Mar. 2, 1981); *United States* v. *Zemek*, 634 F. 2d 1159, 1167 (9th Cir. 1980), cert. denied, *Carbone* v. *United States*, No. 80-900 (Feb. 23, 1981), and *Caliguri* v. *United States*, No. 80-6047 (Mar. 9, 1981), petitions for cert. pending, *Mazzuca* v. *United States*, No. 80-1517 (filed Mar. 6, 1981), *Williams* v. *United States*, No. 80-6307 (filed Mar. 7, 1981), *Janovich* v. *United States*, No. 80-6309 (filed Mar. 5, 1981); *United States* v. *Provenzano*, 620 F. 2d 985, 993 (3d Cir. 1980), cert. denied, No. 80-78 (Oct. 14, 1980). At all events, if the eventual decision in *Turkette* is believed to be of assistance to petitioner, he may seek appropriate relief at that time under 28 U.S.C. 2255 or Fed. R. Crim. P. 35.

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